...reme Court, U.S.

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CASE NO.

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1998

SHEPARD NASH CLIFTON V. HARRY K. SINGLETARY Jr., ROBERT A. BUTTERWORTH.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' denial of a certificate of probable cause for Ground One of the Habeas Petition conflicts with *Lozada v.Deeds*, 498 U.S. 430, 431-32(1991), ***where*** Petitioner demonstrated that reasonable jurists in *Sobel v. State*, 564 So. 2d 1110, 1111 (Fla. 4th DCA 1990), held it was not "reasonable" legal strategy for defense counsel to present an insanity defense to first degree murder, unsupported by the evidence, and at the same time present defense experts to testify the defendant was sane and held presentation of such a defense did hamper the defendant in receiving a second degree murder conviction U.S..Const. Amend. 6, 14.

2. Whether the Court of Appeal, employed the correct standard in Ground One for determining the "reasonableness under the prevailing professional norm" of counsel's conduct under *Strickland v. Washington*, 466 U.S. 668,688 (1984), in accepting counsel's explanation at the evidentiary hearing he was trying to change the law in Florida on insanity when he presented an insanity defense supported only by evidence of "dimmed awareness," without the Court of Appeal analyzing the record to determine if counsel argued or preserved the issue for appeal where preservation of the issue for appeal is the prevailing professional norm if counsel is trying to change the law. U.S..Const. Amend. 6, 14.

3. Whether the Court of Appeal's in Ground One decided an important federal question of when strategy is "reasonable" in a way that conflicts with *Strickland v. Washington*, 466 U.S. at 688, because the Court failed to apply the standard of "reasonableness under

prevailing professional norms," set forth in Strickland, but instead cited to and employed a higher standard requiring the petitioner to show " that no competent counsel would have made such a choice."(See pg 10, U.S.M.D Order dated 7/14/98); See *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998). U.S. Const. Amend. 6, 14.

4 Whether the Court of Appeals' denial of a certificate of probable cause in Claim Four conflicts with *Lozada v. Deeds*, 498 U.S. 430, 431-32(1991), where Petitioner demonstrated other reasonable jurists in *Overton v. State*, 531 So. 2d 1382 (Fla. 1st DCA 1988), have criticized applying the *Strickland* format to the type of claim alleging counsel failed to adequately *investigate* an incident Clifton witnessed of a conversation in a hallway during trial between the trial judge and the victim's father, a retired trial judge, and whether the District Court and Court of Appeal placed an impossible burden on Clifton in finding that to prevail on the merits he had to show: a) "the exact manner in which the investigation or preparation was inadequate"; and b) "whether such information, assuming its admissibility in court, would have produced a different result" when Clifton had no ability to show either of these because of counsel's failure to investigate. U.S. Const. Amend. 6, 14.

5 Whether the Court of Appeals' denial of a certificate of probable cause in Claim Five decided an important federal question in a way that conflicts with relevant decisions of this court in *Duncan v. Henry*, 513 U.S. 364,365 (1995), because Petitioner did present the federal question of whether he had been denied a fair trial under the federal constitution to the state court when he cited federal law standing for the proposition

that a defendant is denied due process and a fair trial when the Court refuses to give a jury instruction that supports a defendant's defense and Petitioner maintained these cases supported the principles that he was denied due process because the court also could not give a jury instruction which negated the defendant's only defense. (See Appendix C in the State's Response to the Habeas Petition filed in U.S. District Court, which provides copy of Appellant's Supplemental Appellate Brief, page 19,20, 21.) U.S. Const. Amend. 6, 14.

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CITATIONS OF REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE.

- Clifton (Shepard Nash) v. State, 573 So. 2d 848 (Fla. 5th DCA 1991)(Table)(No. 90-1162)(PCA without opinion in plenary appeal)

- State v. Clifton, Case No. 88-5331(Fla. Brevard County Circuit Court, Dec.3d, 1993)(Circuit Court Order Denying Fla. R. Crim. P. 3.850 Motion)

- Clifton (Shepard N.) v. State, 641 So. 2d 878 (5th DCA 1994)(Table)(No. 93-3007).(PCA without opinion in Rule 3.850 Appeal)

- Clifton v.Singletary, No. 95-612-Civ-Orl-22C (U.S. M.D., July 14, 1998)(unpublished opinion dismissing habeas petition with prejudice)

- Clifton v. Singletary, No. 95-612-Civ-Orl-22C (U.S.M.D. August 11, 1998)(Order denying Petitioner's Motion for Certificate of Probable Cause)

- Clifton v. Singletary, No. 98-3084(11th Cir. March 1, 1999)(Order denying Petitioner's Motion for Certificate of Probable Cause)

BASIS FOR JURISDICTION

1. The Order sought to be reviewed is the judgment or order of the U. S. Court of Appeal for the Eleventh Circuit denying a motion for a certificate of probable cause entered on March 1, 1999 and is being filed under Rule 10 of the Supreme Court of the United States.

2. The statutory provision conferring on this Court jurisdiction to review on a writ of certiorari, the judgment or order in question is 28 U.S.C. § 2253.

3. Notifications required by Rule 29.4(b(or (c) are not required to be made.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE, S ET OUT VERBATIM WITH APPROPRIATE CITATION.

1. The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense. U.S. Const. Amend 6.

2. The Fourteenth Amendment, Section 1, to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend 14.

STATEMENT OF CASE AND FACTS

1. TRIAL[1]

Petitioner, Shepard Nash Clifton, was indicted for two counts of first degree murder. Defense counsel filed a Notice of Intent to Rely on the Defense of Insanity. (Appendix to Habeas Petition filed by State in U.S. District Court. A144-145) Petitioner retained Dr. Howard Bernstein, a psychologist licensed to practice in Florida, to examine him. Drs. Robert Kirkland and Lloyd Wilder subsequently examined Appellant on behalf of the state.

During trial, Dr. Bernstein, testified that he spent about fifteen hours with Clifton. (A923-924) As a result of emotions he was experiencing due to his wife's adulterous affair with another man, Clifton related he had lost significant weight, had depression and developed an inability to keep food on his stomach. (A923-924) Dr. Bernstein diagnosed Clifton as having an "operative impulse control disorder" or "isolated explosive disorder." (A974) Dr. Bernstein explained when Clifton saw his

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[1] An Appendix of the relevant Orders are attached. Throughout this Petition cites will be made to the Appendix filed by the state in the District Court in response to the habeas petition which consists of Appendix A-Trial transcripts Vol III-X of the Lower Court Record on Appeal in 5th DCA; Appendix B-Transcripts of Evidentiary Hearings and Record on Direct and 3.850 Appeal-Vol. I and II; Appendix C1-Initial Brief of Appellant (Anders); Appendix C2-Answer Brief of Appelle; C3-Supplemental Brief on Appeal; C4 Supplemental Answer Brief; C5-Reply Brief; Appendix D-PCA Decision of Appellate Court dated Jan.15, 1991; Appendix E-Briefs on 3.850 Appeal; Appendix F-PCA Decision on Rule 3.850 Appeal.

wife with her lover, he had panic and fear of losing his wife, impending doom and he began losing the way he thinks, he began losing conscious control, self-discipline, emotional control and had a great deal of confusion. (A976-977) With this confusion and panic, he went into the next stage of anxiety disorder, what is called depersonalization disorder or derealization. (A977) Clifton went into a dream of trance-like state, with feelings of unreality. (A977) He became detached, as if watching himself perform, in a dream like state, kind of like outside watching himself and wasn't in complete control. (A977) There are strange alterations of perception, shapes don't look right, colors don't look right, people don't look right. (A977) This is a kind of "dimmed awareness" in the twilight, Dr. Bernstein testified, you can't see very well, kind of like a dream world, and at this point Clifton had deficits in his intellectual capacity, deficits in self-control, deficits in impulse control. (A977-978) In this situation, he had a sudden failure to resist aggression, and the impulses become far more than needed for the situation and were harmful and destructive. (A978) Clifton performed events that were harmful with little conscious resistence and this isolated excessive disorder occurs quickly and may go away quickly, Dr. Bernstein said. (A978) Dr. Bernstein said in his opinion as a result of the " isolated explosive disorder" and "dimmed awareness," the tragic events occurred. (A978) He stated, in his opinion, Clifton did not have the "control" at the time to conform his behavior to society's standards" (A986)

Prior to cross-examining Clifton, the state moved to strike Dr. Bernstein's testimony on the basis that the defense expert said Clifton had "dimmed awareness,"and was not "able to control his behavior." (A889-890) The state claimed this was the irresistible impulse standard and did not meet the standard for legal insanity in Florida. (A889-990) The state cited Chestnut v. State, 538 So. 2d 820 (Fla. 1989), in which the Florida Supreme Court held that evidence of an abnormal mental

condition, not constituting legal insanity, was not admissible for purposes of showing a lack of specific intent to commit an offense or a lesser degree thereof. (A990-991) The state also asked for a jury instruction under Chestnut v. State.

Defense counsel stated he would not argue that the law was as had been cited by the state but that the defense met the test under the current jury instructions particularly with regard to the new formulation in cases that adopted disease or defect elements. (A991) The Court disagreed and said that Dr. Bernstein's testimony was that "he has less of an awareness of criminality, not that he knows about criminality, but less of being aware of criminality, which is like hedging." (A993) The court then said Dr. Bernstein himself said it was difficult to use sane and insane. The court said he didn't know why it was difficult to say sane or insane because courts do it all the time. (A993)

The court told defense counsel he was inclined to strike the testimony because Dr. Bernstein did not say unequivocally that Clifton was insane. (A994) After further discussion, the court gave his opinion that Clifton killed the two victims and it was not because he was insane and defense reminded the court that was a jury question. (A999) The court said he would allow the testimony but give a special instruction to the jury that "having a dimmed awareness of right and wrong, does not meet the test of insanity under the laws of the State of Florida." (A999, 1002) The Psychological Evaluation of Clifton by Dr. Bernstein was entered into evidence over objection of the state. (A1042)

Clifton testified that prior to the shootings he was depressed and stressed due to the adultery of his wife. He said he battled to keep his marriage together. He testified that on the day of the shootings, he had been following his wife and Mr. Shonk's vehicle while driving his truck. As Clifton followed them, he testified he became angrier and angrier and it was getting harder and harder to control. (A1083) As they proceeded down US-1, he became more nervous and more

anxious and as they approached the Sear Room Restaurant he began to have tunnel vision. (A1084) He felt as though he was going to pass out but shook it off. (A1084) Clifton testified he had an idea he better get out of there. He decided that if they went straight at the next light, he would turn right and if they turned right, he would go straight. (A1084) However, they turned into the Sear Room and he followed them. Clifton testified that the last thing he remembered was telling himself to go in the opposite direction. After that his mind became a complete blank and there was no thought process. (A1085).

As they turned into the Sea Room he felt himself trying to stand up or climb over the steering wheel. (A1084) His hands started to get numb and his feet were getting number. (A1084) He shook it off, but it came back much worse. (A1085) He couldn't feel his hands or feet and the tunnel vision became foggy. (A1085). Clifton said he followed the victims' truck to the back of the restaurant where they parked. Clifton parked behind them. (A1085) Once he stopped there was no thinking process and he reached down into his briefcase which was sitting cracked and open a little bit. He got his pistol, which was in a cocked and locked position in its holster. Clifton stated his eyes were like movie cameras, recording everything, but there was no thought process. (A1086) He seemed to float over to the victim's vehicle and proceeded to describe the shootings. (A1086) His mind was a blank during the time he shot the victims he said. (A1085-1087) Clifton testified about his subsequent actions, his coming out of his blacked out state, his going to his home, and his actions there and subsequent arrest. (A1087-1124).

Clifton's testimony regarding his numbness, his sensation of floating, his tunnel vision experiences, as well as the fact the incident seemed to be happening outside of himself and as if in a dream, were not disputed by any of the expert witnesses who examined him and who believed his testimony as he related it. Dr. Bernstein described this as a "dimmed awareness" (A977)

He stated "Mr. Clifton did not have the ability to conform his ability to what was lawful or right. He could not control his behavior to society's standards."(A979) "He was not aware at this point of right from wrong." (A986)

Dr. Wilder, a psychiatrist testifying for the state, agreed Clifton was suffering from an "explosive disorder". When asked if Clifton knew "whether what he was doing was wrong", he responded "I think that he did." (A1142) When asked if there was any objective support for this, he answered, "Well, you know, the law assumes we are all sane unless there's something to indicate that we're not. Then, how do you prove somebody is sane? I mean you can't." (A1142) He testified that Clifton had a "rapid disassociative reaction." (A1157-58). He further stated that such "disassociation" would be qualified as a mental infirmity, disease or defect."(A1157-58) He qualified, however, by stating that "In other words, a disassociative reaction in itself is not necessarily legal insanity." (A1160-61) Dr. Kirkland, M.D. was also called by the state in further rebuttal of Dr. Bernstein's testimony. He stated he had examined Clifton and found no evidence of disorder. (A1174)

During the jury conference, the state asked for a jury instruction instructing the jury that irresistible impulse and diminished awareness were not legal insanity based on *Chestnut v. State*, 538 So. 2d at 820. (A1193) The Court said it would give the instruction because Dr. Bernstein did not unequivocally say Petitioner was insane. (A1194) Defense counsel argued the jury instruction was a comment on Dr. Bernstein's credibility. (A1194-1197) Defense counsel argued the case setting forth the basis for their motion was Gurganis (phonetic spelling) which he said stood for the proposition that any condition relating to the accused's ability to form specific intent was relevant for expert testimony. (A1194) Defense counsel also cited State v. Mathis (phonetic spelling), second district 1986 case, which he said stood for the proposition of a jury's right to accept or reject expert testimony and that the jury had the right to believe or

disbelieve all or part of Dr. Bernstein's testimony. (A1195) Defense argued the special jury instruction would instruct the jury that Dr. Bernstein was not credible and allow the state in closing to tear apart the testimony of Dr. Bernstein and say Dr. Bernstein would not say Clifton was insane and that less aware is not enough. (A1195) Defense argued that any condition relating to the accused's ability to form specific intent was proper for expert testimony and that the defense theory was that, even if Dr. Bernstein could not take the ultimate step and say Clifton was sane or insane, that this testimony was proper to admit for purposes of defeating the premeditation element of first degree. (A1194-1195). Defense counsel took exception to the court highlighting the fact that the defense expert did not say sane or insane in a jury instruction and told the court the state could use this against the defendant in closing. (A1194-1197).

The court stated "[I] still think the jury should have this instruction, irresistible impulse is not a legal sanity defense. Lessened awareness or dimmed awareness of criminality is not a legal insanity defense." (A1197) After giving the standard instruction on insanity, the trial court gave the following special jury instruction:

> If you find the defendant had mental aberrations or mental deficiencies at the time of the offenses, but that such aberrations or deficiencies does not meet the definition of legal insanity which I have just given you, you may not consider such aberrations and deficiencies in finding the defendant insane. (A1321-1322)

And:

> "Behavior which is not the product of an irresistible impulse is not legal insanity. A lessened awareness or a dimmed awareness of the criminality of one's conduct is not legal insanity." (A1321-1322)

Clifton was found guilty by a jury of two counts of first degree murder on April 17, 1990, in Brevard County, Florida. (T1330) The court imposed consecutive life sentences as to each

count, and Clifton is required to serve no less than twenty-five years on each count before becoming eligible for parole.

Counsel filed a Motion for New Trial arguing the court had abused its discretion in giving the special jury instructions which negated the defense and invaded the province of the jury. (R1470-73) The court denied the motion. (T3-10)

2 **APPEAL OF JUDGMENT AND SENTENCE**

There is no record of any effort by the law firm that represented Clifton at trial to appeal whether "dimmed awareness" should become the law on insanity in Florida. The law firm withdrew from representation of Clifton, and an Ander's brief was filed by the Public Defender. The Fifth District Court of Appeal in Florida issued a per curiam affirmance without opinion of the trial court in Clifton (Shepard Nash) v. State, 573 So. 2d 848 (Fla. 5th DCA 1991)(Table)(No. 90-1162)

3 **POST-CONVICTION MOTION IN STATE COURT**

Clifton subsequently filed a timely post-conviction motion in state court on November 26, 1992, containing the first three claims listed below. (App. B-Vol. 2- pgs. 224-242). An evidentiary hearing was held on the three claims on September 1, 1993. *Id.* At 1-79. On the same day, the defendant filed a supplement to the motion, adding the fourth claim below. A hearing on the supplement was held on October 29, 1993. *Id.* At 80-95. The Court issued a written Order denying all four claims. (See Appendix 4 to this Petition for Certiorari for Circuit Court Order Denying Fla. R. Crim. P. 3.850 Motion- State v. Clifton, Case No. 88-5331(Fla. Brevard County Circuit. Court, Dec.3d, 1993)). The four claims and how the court disposed of them are summarized below:

1)First Ground: Trial counsel failed to request

clarification of the jury's request for information during final deliberations for verdict of the case. The court found this claim was procedurally barred because it should have been raised on appeal and it also failed to show prejudice. (See Appendix 4 to Petition)

2)Second Ground: Trial counsel admitted Petitioner's guilt during opening and closing arguments despite a plea of not guilty. The court denied this claim on the basis that it was good trial strategy. (App.4)

3) Third Ground: Trial counsel knowingly advanced a plea of not guilty by reason of insanity, a defense which was unwarranted and unprovable under existing Florida law. The Court accepted the statements of Andrew Graham, defense counsel, at the evidentiary hearing, that he knew about the controlling Florida Supreme Court precedent in *Chestnut v. State* on not allowing evidence of abnormal mental conditions not constituting legal insanity to prove lack of specific intent but that insanity was the only viable defense in this case and his strategy was to try to "change the law with regard to what constitutes the defense of insanity." (App.4) The court distinguished *Sobel v. State*, claiming Clifton's counsel testimony at the evidentiary hearing he knew the law and made a strategic choice to change it. The court also secondly found that in *Sobel*, after thoroughly examining the record and considering all of the defense's errors, the appellate courts concluded that there was a reasonable probability that the jury would have returned a verdict of guilty to a lesser crime than that of first degree murder and that Clifton had made no such showing.(App.4)

> **4. Fourth Ground** The court said the Petitioner filed a supplement to the Rule 3.850 motion asserting another ground that while in the hallway during a break in the trial he saw his trial judge speaking with a retired judge who was the father of the victim. Petitioner claimed his attorneys failed to investigate the conversation. The Court summarily disposed of this claim as not being properly plead because it lacked supporting details. The Court claimed there also was no assertion of prejudice because even if the Judge believed the defendant guilty he could still provide a fair trial.

(App. 4)

The same Public Defender who wrote an Ander's brief on Clifton's appeal also wrote an Ander's brief on the appeal of the Circuit Court's Order denying the Rule 3.850 motion and Clifton filed a supplemental brief. The Fifth District Court of Appeal per curiam affirmed the trial court in Clifton (Shepard N.) v. State, 641 So. 2d 878 (5th DCA 1994)(Table)(No. 93-3007).

4. HABEAS PETITION IS U.S. DISTRICT COURT

Clifton filed a timely habeas petition in the U.S. District Court of the Middle District of Florida alleging the following five grounds for relief with the following results. (See Appendix 3 to this Petition for Certiorari for District Court's Order-Clifton v. Singletary, No. 95-612-Civ-Orl-22C (U.S. M.D., July 14, 1998)(unpublished opinion dismissing habeas petition with prejudice)

GROUND I.

I. Ineffective Assistance of Trial Counsel in knowingly

advancing a hopeless defense of a plea of not guilty by reason of insanity which was unwarranted and unprovable under existing Florida law.

a. Not raised on appeal
b. Raised in 3.850 motion
c. Received evidentiary hearing
d. Circuit Court Order denied ground.(See above for reasons)
e. State Appellate Court- PCA without opinion in Clifton v. State, 641 So. 2d. 878 (Fla. 4th 1994)(Table)
e. Denied by U.S. District Court (See App. 3 to this Petition-pg. 6) on grounds counsel's conduct was not unreasonable given circumstances of case and "Petitioner clearly confessed several times to the shooting; counsel considered other potential defenses, but concluded none had any merit, (Exhibit B at 44-45); and counsel hoped to change Florida law to reflect the law in existence in other jurisdictions." The District Court further found the insanity evidence did not hamper a second degree murder conclusion.

GROUND II.

Ineffective Assistance of Trial Counsel in failing to make a contemporaneous objection and request for clarification when the court denied the jury's request for depositions/testimony of two psychiatrists who testified at trial.

a. Not raised on appeal
b. Raised in 3.850 motion
c. Did not receive evidentiary hearing
e. State Circuit Court Order denying ground: Clifton v. State, 641 So. 2d. 878 (Fla. 4th DCA1994)(Table)
f. Denied by District Court

GROUND III.

Counsel conceded Petitioner's guilt during opening and closing

which was found to be a tactical decision by counsel by the state court and the District court and denied..

GROUND IV

Ineffective assistance of trial counsel in failing to investigate, move for a mistrial or motion for recusal of the presiding judge when Petitioner, while being moved through a restricted hallway, observed the trial judge in a private conversation with the father of the female victim.

a. Not raised on appeal
b. Raised in 3.850 motion
c. Summarily denied.
d. PCA in Clifton v. State, 641 So. 2d. 878 (Fla. 1994)(Table)
e. U.S. District Court procedurally barred it as not raised in a manner permitted by state procedural rules. Court also held Clifton could not prevail he had to show "a) the exact manner in which the investigation or preparation was inadequate, including any information that would have been obtained from the investigation; and b) whether such information, assuming its admissibility in court, would have produced a different result. (App.3)

GROUND V.

Petitioner was Denied a Fair Trial As Guaranteed by the 14th Amendment to the U.S. Constitution when the court gave a special jury instruction which negated Petitioner's defense and evidence, after the court decided the evidence was legally sufficient evidence under the insanity defense.

a. Raised in direct appeal
b. Denied Clifton v. State, 573 So. 2d 848 (Fla. 5th DCA 1991)(Table Opinion)
c. U.S. District Court denied this claim on the grounds

that the federal claim was not exhausted in state courts and that Clifton only raised a state law abuse of discretion claim in his direct appeal and did not allege a federal constitutional violation. The court found the claim also had no merit because Petitioner was not denied the opportunity to have the jury instructed on his theory of the defense because the court instructed on the insanity defense and the applicable law.

4. **MOTION FOR CERTIFICATE OF PROBABLE CAUSE IN U.S. DISTRICT COURT.**

On August 11, 1998, the District Court Judge denied Clifton's Motion for Certificate of Probable Cause "because Petitioner has not made a colorable showing of the deprivation of any federal constitutional right."(See Appendix 2 to theis Petition: Clifton v. Singletary, No. 95-612-Civ-Orl-22C (U.S.M.D. August 11, 1998)

5. MOTION FOR CERTIFICATE OF PROBABLE CAUSE IN U.S. COURT OF APPEAL FOR ELEVENTH CIRCUIT.

On March 1, 1999, the U.S. Court of Appeal denied Petitioner's Motion for a Certificate of Probable Cause citing *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394, 77 L.Ed. 2d 1090 (1983) (See Appendix 1 to this Petition: Clifton v. Singletary, No. 98-3084(11th Cir. March 1, 1999) This Order is the subject of the instant Petition for Writ of Certiorari.

Petitioner was notified by the Court of Appeal that before his Motion for Certificate of Probable Cause would be processed by the Court of Appeal, he would be required to pay a filing fee of $105. This appears to be applied under Chapter 123, Section 1913(1). Petitioner paid this filing fee but at the same time filed a Notice of Filing Docketing and Filing Fees and Motion to Determine Applicability of Docket and Filing Fees for

Petition for Writ of Habeas Corpus Under the United States Constitution. The Motion argued it was a violation of the United States Constitution to require the Petitioner to pay a filing fee or to submit an affidavit of indigency before processing the Motion for a Certificate of Probable Cause, citing Bocharski v. Circuit Court of Second Judicial Circuit In and For Leon County, 552 So. 2d 946 (Fla. 1st DCA 1989); Bradley v. Sturgis, 541 So. 2d 766 (Fla. 5th DCA 1989) in which Florida courts have held the Florida Constitution does not permit a court to require a habeas petitioner to pay a filing fee or submit an affidavit of indigency because the writ is "grantable of right, freely and without cost.". See e.g., Smith v. Bennett, 81 S. Ct. 895 (U.S. Iowa, 1961)(holding habeas petitioners who are indigent must be allowed to file affidavits of indigency)

Upon denying the Motion for Certificate of Probable Cause, The Clerk's Office at first informed the undersigned counsel, the Motion challenging the payment of filing fees had not yet been ruled on. Because counsel believed this Motion was part of the proceeding to obtain a Certificate of Probable Cause and it was necessary to have a ruling on it to proceed in this Court, Counsel waited for the ruling on the Motion regarding fees. After waiting for some time for an Order on the Motion in order to file this Petition, counsel called the Clerk's Office again and was told by a Deputy Clerk, the Motion would not be ruled on because the Court of Appeal did not accept jurisdiction and had denied the Motion for Certificate of Probable Cause. The undersigned explained that she believed the Court did have jurisdiction over the Motion regarding the filing fees since the Court had collected the filing fee and was not returning the fee and the Motion challenged the constitutionality of that procedure and she would like to have something to present to this Court regarding the denial of the motion to review. The Deputy Clerk informed counsel the Motion regarding fees was being sent back to the court. Recently, counsel inquired again about the status of the Motion regarding filing fees so as to

inform this Court of its status or disposition, and was informed by the Clerk's Office the Motion was still pending but that this did not control the deadline for filing this Petition for Certiorari which dated from the date the Order denying the Certificate of Probable Cause issued on March 1, 1999.

2. THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE IS 22 U.S.C.§ 2254.

ARGUMENT

I. QUESTIONS PRESENTED:

ISSUE 1:
THE COURT OF APPEAL ERRED IN DENYING CERTIFICATE OF PROBABLE CAUSE ON GROUND I OF HABEAS PETITION

- Whether the Court of Appeals' denial of a certificate of probable cause in Claim One conflicts with *Lozada v.Deeds*, 498 U.S. 430, 431-32(1991), *where* Petitioner demonstrated that reasonable jurists in *Sobel v. State*, 564 So. 2d 1110, 1111 (Fla. 4th DCA 1990), held it was not "reasonable" legal strategy for defense counsel to present an insanity defense to first degree murder, unsupported by the evidence, and at the same time present defense experts to testify the defendant was sane and the *Sobel* Court held presentation of such a defense did hamper the defendant in receiving a second degree murder conviction;

- Whether the Court of Appeal, employed the correct standard for determining the "reasonableness under the prevailing professional norm" of counsel's conduct under *Strickland v. Washington*, 466 U.S. 668,688 (1984), in accepting counsel's explanation he was trying to change the law in presenting an insanity defense supported only by evidence of "dimmed awareness," without reviewing the record to determine if counsel preserved the issue for appeal or if it was reasonable under all the circumstances.

- Whether the Court of Appeal's in Claim One decided an

important federal question of when strategy is "reasonable" in a way that conflicts with *Strickland v. Washington*, 466 U.S. 668,688 (1984), because the Court failed to apply the standard of "reasonableness under prevailing professional norms," set forth in Strickland, but instead cited to and employed a higher standard requiring the petitioner to show " that no competent counsel would have made such a choice."(See pg 10, U.S.M.D Order dated 7/14/98); See *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998).

In *Lozada v.Deeds*, this Court reversed the Court of Appeals denial of a certificate of probable cause in a non-capital case:

> "...because, under the standards set forth in *Barefoot*, Lozada made a substantial showing he was denied the right to effective assistance of counsel. ...We believe the issue of prejudice caused by the alleged denial of the right to appeal could be resolved in a different manner than the one followed by the District Court. Since *Strickland*, at least two Courts of Appeals have presumed prejudice in this situation. (Cites omitted) The order of the Court of Appeals did not cite or analyze this line of authority ..."

Id. 498 U.S. at 431-432.

Similarly, the Court of Appeals' denial of a certificate of probable cause in Ground One in Clifton's habeas petition conflicts with *Lozada v.Deeds*, ***where*** Petitioner demonstrated that reasonable jurists in *Sobel v. State*, held it was not "reasonable" legal strategy for defense counsel to present an insanity defense to first degree murder, unsupported by the evidence, and at the same time present defense experts to testify the defendant was sane. The *Sobel* Court found if defense counsel had not presented the inadmissible evidence of an abnormal mental and had the defendant had competent counsel

he may have been convicted of second degree murder instead of first degree murder. See also, *Jackson v. Herring* 42 F.3d 1350 (C.A.11 (Ala.),1995)(Counsel's failure to pursue a Swain challenge was not a reasonable exercise of professional judgment in view of evidence).

Thus, in this case reasonable jurists in the *Sobel* Court held presentation of such an insanity defense unsupported by the evidence was ineffective assistance while the District Court in Clifton's case found this was a reasonable trial strategy because counsel said he was trying to change the law but never reviewed the record to determine whether counsel did try to change the law by preserving the issue for appeal. Further, the Sobel Court, unlike the District Court in Clifton's case, held the insanity defense did hamper the defendant in receiving a second degree murder conviction.

Presumably the Court of Appeal relied on the analysis by the District Court since it did not issue an opinion discussing the issues. The District Court stated:

> "The Court is unable to conclude that counsel's performance was unreasonable given the circumstances of the case. Petitioner clearly confessed several times to the shooting; counsel considered other potential defenses, but concluded none had any merit, (Exhibit B at 44-45); and counsel hoped to change Florida law in existence in other jurisdictions. *Id.* at 46, 51-56. "

And: "The insanity evidence adduced by counsel did not hamper a second degree murder conclusion."

The Court of Appeal employed a standard for determining the "reasonableness" of counsel's conduct that conflicts with *Strickland v. Washington*. In Florida, evidence of an abnormal mental condition is not admissible for the purpose of showing a lack of specific intent to commit first degree murder or a lesser degree thereof. *Chestnut v. State*, 538 So. 2d at 820. The Supreme Court of Florida has refused to adopt the "irresistible impulse" doctrine as a test of competency

in an insanity defense. *Witt v. State*, 342 So.2d 497 (Fla. 1977). Irresistible impulse is not recognized in Florida as an excuse for first degree murder; and a loss of control due to emotional impulse or explosion is not a recognized defense., *Morgan v. State*, 639 So.2d 6 (Fla. 1994) Trial courts and intermediate appellate courts are not empowered to overrule controlling precedent of the Florida Supreme Court and have no choice but to follow the precedent under the principles of stare decisis. Cf. *Herrell v. Seyfarth, Shaw, Fairweather & Geraldson*, 491 So.2d 1173, 1175 (Fla. 1st DCA 1986)("The rule is well established that in the absence of constitutional, or statutory authority reflecting a change in the common law, a district court of appeal is not empowered to overrule controlling precedent of the Florida Supreme Court").

Despite knowing such evidence of an abnormal mental condition would be not be admissible to show insanity, defense counsel presented an expert witness to testify that Clifton had "dimmed awareness" and refused to withdraw the insanity defense even after the Judge advised counsel he would instruct the jury "[a] lessened awareness or a dimmed awareness of the criminality of one's conduct is not legal insanity."

The record shows defense counsel never preserved the issue of whether "dimmed awareness" constituted legal insanity for appeal. (A997-1002) The record shows the state moved to strike the testimony of Dr. Bernstein, the defense expert, and asked for a jury instruction negating his testimony on the grounds that the evidence was the "irresistible impulse" theory which was inadmissible under *Chestnut v. State, Witt v. State, Zamora v. State*, 361 So 2d 776 (Fla. 3d DCA 1978). (A987-992) Defense counsel responded that the evidence met the definition of legal insanity because under the current jury instructions there was a disease or defect element or mental infirmity element that was established through Dr. Bernstein's testimony and that because of this condition, Clifton didn't know what he was doing or its consequences and did not know

it was wrong. (A991-993)

It is obvious from the record that defense counsel was not trying to change the law in Florida on "dimmed awareness" being legal insanity because the main thrust of his argument was that the case law prior to *Chestnut* allowed mental infirmity, defects and infirmities and the current jury instruction permitted this also. Counsel never responded to the state's argument that the Florida Supreme Court precedent in *Chestnut* , held such evidence of an abnormal mental condition was inadmissible for purposes of showing a lack of specific intent for an offense or any lesser degree thereof. To the contrary, counsel argued that the "dimmed awareness" evidence by an expert was admissible to show lack of specific intent. The trial court disagreed and said that Dr. Bernstein's testimony was not that Clifton did not know right from wrong but that Clifton had less awareness of criminality, and his awareness was dimmed between right and wrong. (A991-1002) The state argued any evidence of an abnormal mental condition not constituting legal insanity was not supposed to be admitted under *Chestnut* and Clifton was not entitled to a insanity instruction. (A1000) Defense counsel responded that defense was entitled to an insanity jury instruction in any capacity and the jury was entitled to consider both expert and lay testimony on the issue of insanity. (A1000-1001) Defense counsel said there had been expert testimony that the jury could listen to and they were entitled to a jury instruction. (A1001) Defense counsel said the insanity instruction itself sets forth a lay witness can be consider, expert and non-expert witnesses may be considered in determining the issue of insanity and it would inappropriate to strike Dr. Bernstein's testimony because in addition to expert testimony on the issue of insanity, he corroborated other witnesses testimony. (A1001)

The Court then decided to let the testimony remain on the record but announced he would give a special jury instruction to tell the jury "dimmed awareness" was not legal

insanity. (A1002). During the jury charge conference, defense objected to the special jury instruction advising the jury "dimmed awareness" was not legal insanity citing Gurganis (phonetic and citation not provided in the record) which defense counsel stated stood for the proposition that any condition relating to the accused's ability to form specific intent was relevant for expert testimony and that even if Dr. Bernstein did not say Clifton was insane his testimony was proper given the element of premeditation. (A1194-1195) Defense also cited another case for the proposition that a jury has the right to judge the credibility of a witness. (All95) Defense argued that giving the special jury instruction would focus on a bad aspect of Dr. Bernstein's testimony and opened the door in closing argument for the State to tear Dr. Bernstein apart. (A1195-1196) Defense objected that "anything from the bench regarding credibility of a witness, I think is really improper." (A-1196).

As can be seen above, none of these arguments are an attempt by defense counsel to change the law on insanity in Florida to allow "dimmed awareness" to constitute legal insanity. The prevailing professional norm is to properly preserve an issue for appeal if the lawyer intends to try and change controlling Florida Supreme Court precedent. If the District Court had analyzed the record to determine if the strategy was reasonable under prevailing professional norms, it would have been apparent that changing the law was not the reason for the defense strategy .

It is obvious from the above that the sole reason defense counsel claimed the insanity defense was not to show that Clifton was insane or to change the law on insanity but to get expert testimony in before the jury that Clifton had "dimmed awareness" to corroborate Clifton's testimony of this at the time of the murder and corroborate other defense witnesses testimony in this regard to show lack of premeditation. This was the only way under *Chestnut*, the expert could testify on the absence of specific intent due to an abnormal mental condition.

So the insanity defense was a bogus or sham defense unsupported by evidence because the defense strategy was to use this to present authoritative expert testimony to corroborate Clifton's testimony of a lack of specific intent or premeditation.

To paraphrase Shakespeare, "Oh what a tangled web we weave when first we practice to deceive." Presenting a sham or bogus insanity defense unsupported by the evidence is not "reasonableness under the prevailing professional norm," by lawyers for a very good reason. The reason is a sham defense unsupported by the evidence usually draws damaging jury instructions from the Court that negates the very evidence that the attorney is trying to get in. This is what happened in this case. It is the crux of the ineffective assistance that was never examined in the analysis by the District Court. It is simplistic legal analysis for courts to just color all legal strategy claimed by a defense counsel to refute a charge of ineffective assistance as "reasonable under prevailing professional norms" without analyzing the strategy to determine if it is supported by the record and is objectively not subjectively reasonable and the consequences to the defendant. The standard of review employed by the Court of Appeal and District Court failed to employ the correct standard of review set forth in *Strickland* and evaluate all the circumstances also which include prevailing professional norms.

The public is not protected by this type of rubber stamping by the Courts of any strategy decision by an attorney however damaging to the client, nor is competency encouraged. The sham insanity defense in this case was devastating to Clifton. Notwithstanding the District Court's analysis, that the evidence adduced in support of the defense was helpful to a second degree murder conviction, it is unlikely the jury would have found Clifton could not premeditate because of "dimmed awareness" for second degree murder just after being told by the Court that the jury could not consider the "dimmed awareness" evidence as evidence that Clifton could not premeditate because

he was insane.. The District Court's analysis assumes defense counsel was credible to the jury in arguing in closing that the "dimmed awareness" evidence meant Clifton couldn't premeditate and was only guilty of second degree murder. The District Court analysis failed to examine the effect of the damage the special jury instructions did to the credibility of the defense team and the primary defense witness, Dr. Bernstein. The special jury instruction told the jury that defense counsel and Dr. Bernstein had led them astray in telling them that the "dimmed awareness" evidence meant Clifton couldn't premeditate and was insane

The District Court readily accepted defense counsel's statements at the evidentiary hearing that he had no other viable defenses. The most viable defense not considered by defense counsel was the "truth." If defense counsel had not presented the bogus insanity defense, the testimony of Clifton and other defense witnesses would have been available as evidence of lack of premeditation without a damaging special jury instructions given by the Court.

Both the Court of Appeal and the District Court decided an important federal question of when legal strategy is "reasonable" in a way that conflicts with *Strickland v. Washington*, 466 U.S. at 688, because both failed to apply the proper measure of attorney performance which is "reasonableness under prevailing professional norms" *Strickland*, 466 U.S. at 688. but instead employed a much higher standard requiring the petitioner to show " that no competent counsel would have made such a choice."(See Appendix 2, pg 10, U.S.M.D Order dated 7/14/98); See *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998).

ISSUE 2:

WHETHER THE COURT OF APPEAL ERRED IN REFUSING TO GRANT A CERTIFICATE OF PROBABLE CAUSE ON GROUND 4 OF HABEAS PETITION

The Court of Appeals' denial of a certificate of probable cause in Claim Four conflicts with *Lozada v. Deeds*, because Petitioner demonstrated other reasonable jurists in *Overton v. State*, 531 So. 2d 1382 (Fla. 1st DCA 1988), have criticized applying the *Strickland* format to the type of claim alleging counsel failed to adequately *investigate. Clifton asked counsel to investigate* an incident observed by Clifton during trial. Clifton witnessed a conversation in a hallway between the trial judge and the victim's father, a retired trial judge. Counsel failed to investigate and therefore Clifton had no knowledge of whether anything would have been learned that would have prejudiced him. The trial court, District Court and Court of Appeal placed an impossible burden on Clifton in finding his pleadings legally insufficiency and that he could not prevail on the merits unless he could show: a) "the exact manner in which the investigation or preparation was inadequate"; and b) "whether such information, assuming its admissibility in court, would have produced a different result" Clifton had no way of showing he the investigation was inadequate because there was no investigation by counsel; and he could not show whether the information would have produced a different result because his counsel did not investigate so how could he have learned what information was communicated. could not show the investigation was inadequate due to counsel's failure to investigate and there would be no way of Clifton knowing whether it would have produced a different result because his counsel didn't investigate.

ISSUE 3:
WHETHER THE COURT OF APPEAL ERRED IN REFUSING TO GRANT A CERTIFICATE OF PROBABLE CAUSE ON GROUND 5 OF HABEAS PETITION

Whether the Court of Appeals' denial of a certificate of probable cause in Claim Five decided an important federal question in a way that conflicts with relevant decisions of this court in *Duncan v. Henry*, 513 U.S. 364,365 (1995). Petitioner did present the federal question of whether he had been denied a fair trial and due process under the federal constitution, by citing federal law which stands for the proposition that when a court refuses to instruct on the defendant's only defense he is denied a fair trial and due process. Clifton argued this law inferred that the federal constitution also forbids a court giving a jury instruction that negates the defendant's only defense. (App.C- to State's Rsp to Habeas Petition filed in U.S. District Court, Supp. Appellate Brief, page 19,20, 21.)

Clifton filed a pro se Supplemental Brief on Appeal. (See Appendix C3 to State's Rsp. To Habeas Petition filed in District Court) The caption of the Issue was denominated as follows:

> DID THE COURT ABUSE ITS DISCRETION BY GIVING SPECIAL JURY INSTRUCTIONS WHICH NEGATED THE ONLY DEFENSE PRESENTED BY THE DEFENDANT DURING THE COURSE OF THE TRIAL, AND DOES THE GIVING OF SUCH INSTRUCTIONS CONSTITUTE REVERSIBLE ERROR.

(Appendix C3 to State's Rsp in Habeas Petition-Supplemental Brief in Appeal filed in 5th DCA)

Even though the caption of Issue I uses the term "abuse of discretion," the content of the argument itself reveals that on

page 20 of the supplemental brief in the "Argument" portion, Clifton argued this was a violation of his right to a fair trial and cited federal case law enunciating that standard of review. (Appendix C3-page 20 of Supplemental Brief in 5th DCA) Clifton cited federal case law which held the accused is always entitled to an instruction on his theory of defense and he stated this concept had long been recognized by both Florida and ***federal courts:***

> "The Courts have held, "[w]here the evidence presents a theory for which there is a foundation in the evidence, refusal of charge on that defense is reversible error." United States v. Taglione, 546 F. 2d 194 (5th Cir. 1977); United States v. Russel, 717 F. 2d 518 (11th Cir. 1983). The court deciding Srauss v. United States, 376 F. 2d 416 at 419 (5th Cir. 1967), stated:
>
> "It is elementary law that the defendant in a criminal case is entitled to have presented instructions related to a theory of defense for which there is any foundation in the evidence. ..."

(C3-20)

Clifton, then admitted the trial court's jury instruction did state the law, but "**the distinction at bar has its roots in a more fundamental aspect of due process as is demonstrated herein,**" and that "...when a trial court deviates from a standard jury instruction and the erroneously given instruction tends to negate a defendant's defense, or a portion of it, the error is considered fundamental, prejudicial and reversible."

The District Court did not comprehend the argument made by the Petitioner in deciding the claim had no merits thinking Petitioner was claiming his theory of defense was not instructed on just because he cited federal cases for that proposition when Clifton was arguing the inference from these cases meant that the court could not give a jury instruction

negating his only defense.

In Snowden v. Singletary, 135 F.3d 732, 736 (C.A.11 (Fla.), 1998), the Court of Appeal held a habeas petitioner properly exhausted, in state courts, federal law issues, by providing sufficient information about claims on direct appeal to notify state courts that challenges were being made on both state and federal grounds, regardless of whether issues were only raised during state collateral-relief proceedings in context of ineffective-assistance-of-counsel contentions.

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Court this Petition for Certiorari or other such relief as this Court deems necessary.

Respectfully submitted,

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APPENDIX

CASE NO.

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1998 TERM

SHEPARD NASH CLIFTON V. HARRY K. SINGLETARY Jr., ROBERT A. BUTTERWORTH.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 1 1999
THOMAS A.KAHN
CLERK

NO.98-3084

SHEPARD NASH CLIFTON
Petitioner-Appellant

versus
HARRY K. SINGLETARY,
ROBERT A. BUTTERWORTH,
Respondents-Appellees

Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Because appellant has failed to make a substantial showing of the denial of a federal right, his motions for a certificate of probable cause is DENIED. See Barefoot v. Estelle, 463 U.S. 880,893,103 S Ct. 3383,3394, 77 L. Ed. 2d 1090 (1983).

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SHEPARD NASH CLIFTON
Petitioner,

v. **CASE NO. 95-612-CIV-ORL-22C**

HARRY K. SINGLETARY, JR., et al.,
Respondents.

ORDER

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C. § 2254 (Doc. No.1). Respondents filed a response to the petition in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases in the United States District Courts* (Doc. No. 7). In addition, Petitioner filed a supplemental memorandum of law (Doc. No. 15), to which Respondents responded (Doc. No. 17), and Petitioner filed a reply (Doc. No.21).

Petitioner alleges five claims for relief in his habeas petition: first, that his trial counsel was ineffective for advancing an insanity defense; second, that his trial counsel was ineffective for failing to request clarification of the jury's request to read depositions of two psychiatrists; third, that the trial counsel was ineffective for admitting Petitioner's guilt during opening and closing statements; fourth, that counsel was ineffective for failing to investigate a conversation between the trial judge and a victim's father; and fifth, that Petitioner was denied a fair trial when the trial court gave a special jury instruction that negated his insanity defense.

Procedural History

Petitioner was charged by indictment with two counts of first degree murder. A jury trial was conducted on April 9-17,1990. The evidence presented established that petitioner was a former law enforcement officer who suffered greatly when he and his wife experienced marital difficulties. Eventually, he shot his wife and her boyfriend, killing them both.

On several occasions prior to the shooting, Petitioner threatened to kill both the victims. (Exhibit A at 470-71,489,492,706,708.) Petitioner was obsessed with his wife, often following her. In fact, Petitioner was even once arrested and then "unarrested" for loitering and prowling near his estranged wife's home. *Id.* at 508-10.

One eyewitness testified that he saw the vehicle used by the murderer and described some of the perpetrator's clothes. *Id* at 62-63,68. Law enforcement immediately went to Petitioner's home and found the vehicle described by the witness. (Exhibit A at 113-15,125-26.) Petitioner came out of the house and confessed to the crimes.[1] *Id* at 116-18,126-29. He also told the law enforcement officers that the murder weapon was in his house. *Id.* at 117-18,362. A weapon was found in the house which was determined to have fired the fatal shots. *Id* at 813-334-1567-41. Petitioner asked the transport officer whether the victims were dead. *Id* at 129.

After his arrest, Petitioner confessed to the crime in writing and orally. (Exhibit A at 400, 405-07,452,626,766-69.) At trial, Petitioner testified in his own defense, claiming temporary insanity. He described the shooting as a dream sequence over which he had no control. *Id.* at 1085-88, 1122-23. Before the shooting Petitioner had received mental health counseling. *Id* at 1070, 1072-73. Both the State and the defense called experts to

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[1] The recording of Petitioner's confession was played for the jury. (Exhibit A at 396-413)

testify regarding Petitioner's insanity defense. *Id* at 1125-69,1170-82, 908-1043.

The jury found the Petitioner guilty of both counts of first degree murder. (Exhibit B at 166-77.) The prosecution did not seek the death penalty, and Petitioner was sentenced to two consecutive life sentences. *Id.* 187-91.. He filed a timely appeal.

Petitioner's private counsel was granted leave to withdraw, *id.* at 204, and the public defender was appointed to represent Petition on appeal. *Id* at 206. After the public defender filed and Anders[2] brief, (Exhibit C1), Petitioner filed a *pro se* supplemental brief raising one issue."Did the court abuse its discretion by giving special jury instructions which negated the only defense presented by the defendant during the course of the trial, and does the giving of such instructions constitute reversible error?" (ExhibitC3.) On January 15, 1991, the appellate court *per curiam* affirmed the judgment and sentence. *Clifton v. State*, 573 So. 2d 848)(Fla. 5th DCA 1991)

Petitioner subsequently filed a Rule 3.850 motion for postconviction relief, through which he raised four ineffective assistance of counsel claims.[3] The claims raised and the trial court's rulings were as follows:

1. Trial counsel failed to request clarification of the jury's request for information during final deliberations for verdict of the case.

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[2] *Anders v. California, 386 U.S. 738 (1967)*

[3] The first three claims were raised in the Petitioner's original November 26,1992, Rule 3.850 motion. (Exhibit B at 224-42) A hearing on the first three claims was conducted on September 1, 1993. *Id* at 1-79. On the same day petitioner filed a supplement to the motion, adding the fourth claim. A hearing on the supplement was held on October 29,1993. *Id.* At 80-95.

Result: The claim was found to be barred because it was not raised on direct appeal. In addition, Petitioner failed to demonstrate prejudice from the alleged failure

2. Trial counsel admitted Petitioner's guilt during both opening and closing arguments, despite a plea of not guilty.

Result: The claim was denied because trial counsel's statements were on sound trial strategy.

3. Trial counsel knowingly advanced the plea of not guilty by reason of insanity, a defense which was unwarranted and unprovable under existing Florida law.

Result: The claim was denied because there was no other defense available and counsel made a strategic decision to attempt to change the law on insanity.

4. Trial counsel was ineffective for failing to investigate a conversation between the trial judge and a retired judge who was the father of one of the victims.

Result: This claim was denied as not properly pled and was legally insufficient.[4]

(Exhibit B at 224-42,271-75.)

Petitioner timely appealed the denial of his postconviction motion. The public defender filed an *Anders*

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[4] During the October 29,1993 hearing, the trial judge afforded the Petitioner a forty-five day period of time to file an amendment to the supplemental Rule 3.850 motion containing factual allegations sufficient to sustain the claim. (Exhibit B at 90-94.) petitioner failed to file such amendment.

Brief. (Exhibit E1.) Petitioner then filed a *pro se* brief, arguing that the trial court erred in denying the motion. (Exhibit E3.) On August 9, 1994, the appellate court *per curiam* affirmed the trial court. (Appendix F.)

Claims One, Two, Three, and Four

In his first four claims, Petitioner contends that trial counsel rendered ineffective representation. The four errors attributed to counsel are as follows: 1)unreasonable reliance on an insanity defense; 2)failure to request clarification of a jury request to review the depositions of the State's two rebuttal psychiatrists; 3)conceding Petitioner's guilt during opening and closing statements; and 4) failing to investigate a conversation between the trial judge and one of the victim's fathers.

A. Legal Standard

The United Stated Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. The first prong of the *Strickland* test requires that the petitioner demonstrate that counsel's performance was deficient and "fell below an objective standard of reasonableness." *Id* at 688. Under the second element of the *Strickland* test, the petitioner must show that the deficient performance prejudiced the defense. *Id.* at 687. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90; *Weeks v. Jones*, 26 F. 3d.1030,1036, (11th Cir. 1994), *cert denied*, 513 U.S. 1193 (1995).[5]

B. Claim One

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[5] In *Lockhart v. Fretwell*, 506 U.S. 364,372 (1993), the Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

Petitioner first avers that trial counsel was ineffective for utilizing an insanity defense knowing that the defense witnesses were not able to testify that the elements for insanity under Florida law were met.

Certainly, counsel's trial strategy was not unreasonable under the circumstances. As noted by the Eleventh Circuit Court of Appeals in *Spaziano v. Singletary*, 36 F.3d 1028,1039 (11th Cir. 1194), *cert. denied*, 513 U.S. 1115 (1995):

> The Supreme Court has mandated a highly deferential review of counsel's conduct, especially where strategy is involve. Intensive scrutiny and second' guessing of attorney performance are not permitted. Because it is a wide range of performance that is constitutionally acceptable, the cases in which habeas petitioners con properly prevail on the ground of ineffective assistance of counsel are few and far between. Cases in which deliberate strategic decisions have been found to constitute ineffective assistance are even fewer and farther between. *This case is not one of them*.

(Citations omitted) (quotations omitted)(Emphasis added). The Court is unable to conclude that counsel's performance was unreasonable give the circumstances of the case. Petitioner clearly confessed several times to the shooting; counsel considered other potential defenses, but concluded none had any merit, (Exhibit B at 44-45); and counsel hoped to change Florida law to reflect the law in existence in other jurisdictions. *Id* at 46,51-56.

Moreover, Petitioner's only suggestion of another defense was to argue for second degree murder. The insanity evidence adduced by counsel did not hamper a second degree murder conclusion. On the contrary, the evidence set forth by the doctors and lay witnesses arguably supported a claim for a lesser included offense, such a second degree murder or manslaughter. In fact during closing arguments, defense counsel

argued just such a possibility. (Exhibit A at 1255-56,1281-84.)[6] Petitioner has not demonstrated that the insanity strategy was detrimental to his case. The record reveals that counsel put forth a vigorous defense and, given the circumstances of the case, the reliance on this defense did not render the trial fundamentally unfair or unreliable.

C. Claim Two

During deliberations, the jury requested copies of the depositions of the State's two rebuttal psychiatrists. (Exhibit A at 1328) After a discussion off the record with counsel, the trial judge denied the request since the depositions were not in evidence. Petitioner argues that trial counsel should have objected to the trial court's decision and determined whether the jury really wanted to read the trial testimony of the doctors, as opposed to the deposition testimony.

The trial court found that this claim should have been raised on direct appeal and the ineffective assistance of counsel label was merely a device to attempt to avoid the procedural bar. Thus, the trial court found that the claim was procedurally barred. In addition, the state court found that Petitioner's failure to demonstrate prejudice also necessitated a denial on the merits

The federal court must dismiss those claims or portions of claims that either(1)have been explicitly ruled procedurally barred by the highest state court considering the claims,[7]or (2) are not exhausted but would clearly be barred if returned to

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[6] During the evidentiary hearing on Petitioner's Rule 3.850 motion, defense counsel testified that even if the defense could not change the law on insanity, their strategy included using the insanity evidence to argue for a lesser charge, such as second degree murder or manslaughter. (Exhibit B at 56-58,61-62.)

[7] *Harris v. Reed*, 489 U.S. 255 (1989).

state court.[8] Thus, "[f]ederal courts are precluded from addressing claims that have been held to be procedurally defaulted under state law. In addition, federal courts may not address claims that have not been presented in state court would have found the claims to be procedurally defaulted..." *Tower v. Phillips*, 7 F.3d 206,210,(11th Cir. 1993).[9]

Claim two was raised in Petitioner's Rule 3.850 motion and is procedurally barred in this Court because the last state court rendering a judgment in Petitioner's case clearly and expressly stated that its judgment rested on the procedural bar.[10] *Harmon v. Barton*, 894 F.2d 1268,1273 (11th Cir), *cert. denied*, 498 U.S. 832 (1990) ("[P]er curiam affirmance of the trial

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[8] See, e.g., *Coleman v. Thompson*, 501 U.S. 722,735 n.1 (1991)(if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement wound now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims);*Bassette v. Thompson*, 915 F .2d 932,937 (4th Cir. 1990), *cert. Denied*, 499 U.S. 982 (1991) ("[w]hen a claim is never presented to the state court *Teaque* does not require that the last state court rendering judgment' clearly and expressly' state that its judgment rests on a procedural bar.")

[9] Also, if the petitioner attempts to raise a claim in a manner not permitted by state procedural rules, he is barred from pursuing the same claim in federal court. *Alderman v. Zant*, 22F.3d 1541,1549(11th Cir.), *cert. Denied*, 513 U.S. 1061 (1994).

[10] Although the trial court addressed this claim in the alternative, this claim is still procedurally barred. In *Alderman v. Zant*, 22 F .3d 1541,1549, (11th Cir.), *cert. Denied*, 513 U.S. 1061 (1994) the Eleventh Circuit Court of Appeals stated as follows:

> [W]here a state court has ruled in the alternative, addressing both the independent state procedural ground and the merits of the federal claim, the federal court should apply the state procedural bar and decline to reach the merits of the claim.

(Citations Omitted).

court's ruling explicitly based on procedural default is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal court."). Thus, this claim is procedurally barred from consideration by this Court.

However, there are two exceptions to the procedural default bar: the first is the 'cause and prejudice" exception;"[11] the second, which is a narrow one, is the "actually innocent" exception, alternatively known as the "fundamental miscarriage of justice" exception, used in extraordinary circumstances. See *Johnson v. Singletary*, 938 F.2d 1166,1174-75, (11th Cir 1991), cert. Denied, 506 U.S. 930 (1992).

In the present case, Petitioner has not shown either cause or prejudice that would excuse the default. Likewise, Petitioner has not demonstrated the applicability of the actually innocent exception. The Court has reviewed the entire record and concludes that Petitioner is unable to satisfy either of the exceptions to the procedural default bar. Therefore Petitioner's claim two is procedurally barred.[12]

D. Claim Three

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[11]See Engle v. Isaac, 456 U.S. 107,129 (1982)("when a procedural default bars state litigation of a court claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and prejudice.")

[12]Alternatively, the Court concurs in the trial judge's finding that Petitioner has not demonstrated prejudice as a result of the alleged failure. The depositions of the two doctors had not been entered into evidence and the jury clearly was not entitled to receive copies of such depositions. Moreover, assuming that the jury request actually sought the trial testimony of the two doctors, Petitioner still has not demonstrated prejudice. There is nothing in the record to indicate that a written copy of the trial testimony of two of the State's rebuttal witnesses would have impacted the jury's ultimate decision. Petitioner's speculation and conjecture simply is not sufficient to support his claim, which cannot succeed on the merits.

During opening statements of Petitioner's trial, defense counsel made the following remarks to the jury:

> [The prosecutor] has described for you accurately the shooting that occurred in this case.
>
> And certainly you have gathered through the voir dire and through opening statements, there is no argument. There is no issue that Shepard Clifton shot and killed Linda Clifton and Reggie Shonk. That did in fact occur. There's nothing that I can say here to you today. No questions about that. That is a fact, that which we have presented to you. That is something you already know. The issue before you is why this occurred. And what was the state of mind of Shepard Clifton.
>
> ...
>
> And Shepard watched himself approach the driver's side of the vehicle. He saw himself looking at Reggie and Linda there together again.
>
> Reggie Shonk was opening the truck door. He saw himself pull the trigger and pull the trigger again. He heard a scream. To Shepard, it was all a dream, a nightmare.

(Exhibit A at 38,48.) During closing argument, defense counsel again conceded Petitioner's role in the shooting. Id at 1254.

It is readily apparent that counsel's statements during opening and closing arguments were based on a tactical decision. Strategic choices of trial counsel are granted a heavy measure of deference in a subsequent habeas corpus attack. *Strickland*, 466 U.S. at 690-91; *Adams v. Wainwright*, 709 F .2d 1443,1445 (11th Cir. 1983), *cert. denied*, 464 U.S. 1063 1984) (a tactical decision amounts to ineffective assistance of counsel "only if it was so patently unreasonable that no competent attorney would have chosen it"). Petitioner has not demonstrated that counsel's strategic decisions concerning the conduct of the trial and embodied in opening and closing argument were "patently unreasonable." See *Rushing v. Butler*,

868 F 2d 800,805 (5th Cir. 1989) (counsel's closing arguments, which petitioner contended conceded his guilt, accurately reflected both the record and petitioner's testimony and did not constitute ineffective assistance of counsel). Based on the evidence and Petitioner's testimony, the strategic decision of defense counsel was neither unreasonable nor prejudicial.[13]

E. Claim Four

Petitioner argues that trial counsel did not adequately investigate an incident observed by Petitioner during the course of his trial. According to Petitioner, he observed the trial judge and a retired judge, who was also the father of one of the victims, engaged in conversation in a courthouse corridor. Petitioner states that he reported the incident to his attorney and requested an investigation, but none was done. He now claims that the failure to conduct an investigation amounted to ineffective assistance of counsel.

Petitioner raised this argument in his Rule 3.850 motion. The trial court rejected the claim, stating that it was "summarily disposed of as not being properly plead [sic]. It does not state with legal sufficiency a ground upon which 3.850 relief can be based." (Exhibit B at 274-75.) Thus, the claim was raised in a manner not permitted by state procedural rules and is procedurally barred in the Court. *Alderman v. Zant*, 22 F .3d at 1549. Having failed to demonstrate cause and prejudice or actual innocence, Petitioner is barred from now pursuing this claim in federal court.

Moreover, Petitioner cannot prevail on the merits of this claim. Under these circumstances, Petitioner must show a) the exact manner in which the investigation or preparation was

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[13] Petitioner particularly cannot overcome the prejudice prong of the Strickland standard since counsel's concessions , as well as his trial testimony. (Exhibit A at 116-18,126-29,400,405-07,452,626,766-69,1085-87,1095.)

inadequate, including any information that would have been obtained from the investigation, and b) whether such information, assuming it's admissibility in court, would have produced a different result. *See. U.S. ex rel. Cross v. DeRobertis*, 811 F.2d 1008,1016(7th Cir. 1987)(The focus of the *Strickland* inquiry must be on what information would have produced a different result): *Flores v. Johnson*, 957 F. Supp. 893, 912 (W.D. Tex, 1997) (to show ineffective assistance of counsel, the petitioner must do more than merely allege a failure to investigate; rather, the petitioner must state specifically what the investigation would have revealed, what evidence would have resulted, and how the outcome of the case would have been altered). The party must provide evidence, not mere conclusory allegations, that counsel overlooked exculpatory information. *Barkauskas v. Lane*, 946 F.2d 1292,1295 (7th Cir. 1991); *cf, Aldrich v. Wainwright*, 777 F .2d 630,637 (11th Cir. 1985), cert. Denied, 479 U.S. 918 (1986)(speculation insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation). In the present case, Petitioner has not satisfied either of the above referenced factors. Petitioner's bald assertions are inadequate to overcome the presumption that counsel acted reasonably. *Matura v. United States*, 875 F. Supp. 235, 237 (S.D.N.Y. 1995). Moreover, Petitioner has not shown prejudice. Therefore, this claim is without merit.

Claim Five

Petitioner next argues that he was denied a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution when the trial court gave special jury instructions regarding his insanity defense. The challenged instructions stated, as follows:

If you find the Defendant had mental aberrations or mental deficiencies at the time of the offense, but that such aberrations or deficiencies do not meet the definition of legal insanity which I have just given you. [Sic]

You may not consider such aberrations and deficiencies in finding the Defendant was insane.

Behavior which is a product of an irresistible impulse is not legal insanity. A lessened awareness or a dimmed awareness of the criminality of one's conduct is not legal insanity.

(Exhibit A at 1321-22.) Petitioner contends that the trial court's deviation from the standard jury instruction invaded the fact finding province of the jury, violating his Fourteenth Amendment rights. On direct appeal, Petitioner challenged the same instructions, arguing that the trial court abused its discretion in giving the special instructions.

In the instant case, it appears that the federal constitution portion of the claim has not been exhausted in the state courts. The United States Supreme Court has determined that in order to satisfy the exhaustion requirement, a state petitioner must "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364,365,(1995) (citing *Picard v. Conner*, 404 U.S. 270. 275-76 (1971) (internal quotation marks omitted). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998).

Petitioner raised only the state law abuse of discretion claim in his direct appeal. He did not allege a federal constitutional violation. Thus, the federal claim has not been exhausted and would be procedurally barred if now raised in the state court. Accordingly, this claim is also procedurally barred in this court.

However, as stated above, there are two exceptions to the procedural default. "cause and prejudice" and "actual innocence". Again, Petitioner has not shown either cause or prejudice that would excuse the default. Likewise, the Petitioner has neither alleged nor shown the applicability of the actually innocent exception. The entire record has been reviewed, and the Court concludes that Petitioner is unable to satisfy either of the exceptions to the procedural default bar. Therefore, this claim is procedurally barred.

Alternatively, this claim is without merit. Petitioner argues that "the defendant in a criminal case is entitled to have jury instructions relating to the theory of his defense as long as there is any foundation for such in the evidence." (Doc. No. 1, attached memorandum of law at 14.) The Court clearly instructed the jury on the Petitioner's insanity defense; however, Petitioner finds fault with the two special instructions regarding mental deficiencies and dimmed awareness. Thus, this is not a case where Petitioner was denied the opportunity to have the jury instructed on his theory of the defense. Furthermore, in his supplemental appellate brief, Petitioner concedes that the given instructions correctly stated Florida law. (Exhibit C3 at 20.) Despite the accuracy of the instruction, petitioner appears to argue that the trial court's instructions deprived him of the opportunity to have the jury reach a favorable, although incorrect, verdict. This simply does not constitute a federal constitutional violation capable of redress through habeas

corpus proceedings. See *Williams v. Wainwright*, 712 F.2d 1375,1377 n.4 (11th Cir. 1983). The trial court properly instructed the jury as the applicable law, and this claim must fail.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is ORDERED AND ADJUDGED as follows:

1. The Petition for Writ of Habeas Corpus filed by Shepard Nash Clifton is DENIED, and this case is DISMISSED WITH PREJUDICE. The Clerk of the Court shall judgment accordingly.

2. The Clerk of the Court is directed to close this case.

DONE AND ORDERED at Orlando, Florida, this 14th Day of July, 1998.

/s/Anne c. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies to:
sa 7/10
Counsel of record
Shepard Nash Clifton

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SHEPARD NASH CLIFTON
Petitioner,

v. **Case NO. 95-612-CUV-ORL-22C**

HARRY K. SINGLETARY, JR., et al.,
Respondent.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SHEPARD NASH CLIFTON
Petitioner

-vs- **Case No. 95-612-CIV-ORL-22C**

HARRY K. SINGLETARY, JR., et al.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a Decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Petitioner, Shepard Nash Clifton take nothing and the action be dismissed.

Date: July 14, 1998

RICHARD D. SLETTEN, Clerk
By:_____
Deputy Clerk

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA.
CASE NO. 88-5331-CFA

STATE OF FLORIDA
Plaintiff,
vs.
SHEPARD NASH CLIFTON
Defendant
_____/

ORDER DENYING MOTION FOR POST CONVICTION RELIEF

THIS CAUSE came before the court for an evidentiary hearing on the Defendant's Motion for Post Conviction Relief. Having heard the argument of counsel for the respective parties and having considered the evidence and testimony presented, this Court addresses each ground set forth in the motion;

The first issue presented by the Defendant is whether counsel was ineffective in failing to call for clarification of the trial jury's request for information during final deliberations in the case. This ground is foreclosed because the failure to clarify should have been raised on direct appeal. Charges of ineffective assistance of counsel cannot be used to get around the rule that post conviction proceeding cannot be used as a second appeal. Lopez v. Dugger, 18 Fla. L. Weekly 471 (Fla. Sept. 2, 1993); Medina v. State, 573 So. 2d 293, 295 (Fla. 1991). Additionally, to overcome the presumption of effective assistance of counsel, a defendant must show that there was a reasonable probability that absent the claimed error the jury would have had a

reasonable doubt concerning guilt. Strickland v. Washington, 466 U.S. 668,104 S. Ct. 2052, 80 L.Ed2d 674 (1984). The Defendant has not demonstrated prejudice from this alleged failure of counsel.

The second issue Defendant raises is whether counsel was ineffective because trial counsel admitted Defendant's guilt during opening and closing argument. The state of mind of a defendant is the crux of the Defendant's asserted affirmative defense of insanity. Counsel admitted what the facts would show and contested the subjective state of mind of the Defendant. That is not error. See, McNeal V. State, 409 So. 2d 528 (Fla. 5th DCA 1982), review denied, 413 So. 2d 876 (Fla. 1982, approved, McNeal v. Wainwright, 722 F. 2d 674 (11th Cir. 1984) (commonly considered good trial strategy for a defense counsel to make some halfway concessions to the truth in order to give the appearance of reasonableness and candor and to thereby gain credibility and jury acceptance of some more important position).

The third issue presented by the Defendant was whether counsel was ineffective because counsel knowingly advanced a plea of not guilty by reason of insanity which was unwarranted by existing Florida law. Howard Bernstein, Ph.D., testified during the trial of the cause that the Defendant did not have the ability to control his behavior to society's standards. Trial Transcript at 979,984,986. True, the defense of insanity has been established by decisional law, and evidence of irresistible impulsive behavior does not constitute the defense of insanity. Gurganus v. State, 451 So. 2d 817, 821 (Fla. 1984). However, one of the Defendant's trial counsel, Andrew Graham, Esquire, testified at the evidentiary hearing that insanity was the only viable defense in this case and that he tried the change the law with regard to what constitutes the defense of insanity. Howard Bernstein's testimony would support the fact of irresistible impulse which would be appropriate for the defense of insanity in some jurisdictions other than Florida.

The decision to try to change the decisional law in Florida on insanity is a strategy decision of counsel. Trial counsel will be afforded great latitude in conducting a defense. See, Zamora v. Dugger, 834 F. 2d 956, 959 (11th Cir. 1987) (counsel's attempt to explain defendant's alleged insanity by claiming it was caused by subliminal "television intoxication" does not render his assistance ineffective); State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987), cert. denied, 484 U.S. 873, 108 S. Ct. 209, 98 L.Ed.2d 161 (1987) (strategic decisions will not constitute ineffective assistance if alternative courses of action have been considered and rejected). Counsel will not be deemed to have deficiently protected a Defendant's sixth amendment right to counsel because of tactical decisions. McNeal v. Wainwright, 722 F. 2d at 676.

In Sobel v. State, 564 So. 2d 1110, 1111 (Fla. 4th DCA 1990), the Fourth D.C.A. ruled that a defendant had received ineffective assistance of counsel in part because the defense had announced that he would rely on an insanity defense but had no credible evidence to support that theory. The court also found that Sobel's counsel deficiently had called witnesses whose testimony was known to be prejudicial to Sobel's case and had failed to seek suppression of physical evidence that the police obtained by searching Sobel's handbag. Id. At 1112. Sobel does not compel a contrary result in the instant matter for two reasons. First, unlike counsel in that case, counsel in the case at bar knew the law and made a strategic choice to try to change it. Secondly, in Sobel, after thoroughly examining the record and considering all of the defense's errors, the appellate court concluded that there was a reasonable probability that the jury would have returned a verdict of guilty to a lesser crime than that of first degree murder. Id. at 1112. No such showing has been made by the movant here.

Finally, on September 1, 1993 the Defendant filed a Supplement to his 3.850 Motion which asserted another ineffective assistance of counsel claim. Defendant states that

while in the hallway during a break in the trial he saw his trial judge speaking with a retired judge who was the father of the victim. Defendant claims his attorneys failed to investigate that conversation. This ground is summarily disposed of as not being properly plead. It does not state with legal sufficiency a ground upon which 3.850 relief can be based. See, Vento v. State, 621 So. 2d 493 (Fla. 4th DCA 1993) (claim that counsel was ineffective for failing to persist with motion for mistrial or to interview the jury panel after one juror recognized some people in the courtroom found legally insufficient due to lack of supporting details).

There is no assertion of what was said or how it affected the trial judge, who was not the fact finder, and his relation to the trial jury. What did the trial fudge do as a result of this conference that affected the calculus of the trial? Even assuming as true that which is asserted, the Defendant has not alleged any prejudices, i.e. that because of the alleged error a jury would have a reasonable doubt respecting his guilt. Even a trial judge who believes a defendant is guilty can provide a fair trial. See, Moser v. Coleman, 460 So. 2d 385, 386 (Fla. 5th DCA 1984), petition for review denied, 467 So. 2d 1000 (Fla. 1985)(Fact that judge has heard some of the evidence and has an attitude regarding the guilt of the accused does not, ipso facto, disqualify him from hearing the matter).

Further, the alleged conference was known to the Defendant before the end of the trial. The Florida Supreme Court has held that allegation of bias on the part of the trial judge involving facts and circumstances known at the close of trial could have been addressed on direct appeal and are not cognizable under rule 3.850. Ziegler v. State, 452 So. 2d 537,539, (Fla. 1984). The fact that the Defendant argues this ground as a claim of ineffective assistance of counsel is not determinative. Lopez, 18 Fla. L. Weekly at 471; Medina, 573 So. 2d at 295.

DONE AND ORDERED this 3rd day of December, 1993 in Titusville, Brevard county, Florida.

/s/ John Dean Moxley
JOHN DEAN MAXLEY, JR.

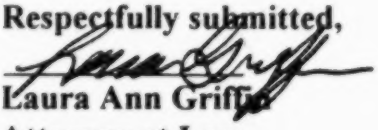
THE MOVANT HAS THIRTY DAYS TO APPEAL FROM THE RENDITION OF THIS ORDER

Copies furnished to:
Brian Onek
Assistant Public Defender
Glenn Craig
Assistant State Attorney
/s/Vicki Clark
Vicki Clark, Judicial Assistant

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof of the foregoing is being presented to the Clerk separately and also has been furnished by U.S. Mail to Carman F. Corrente, Assistant Attorney General, 444 Seabreeze Blvd, Fifth Floor, Daytona Beach, Florida 32118 and to Shepard Clifton, #138594 Marion Correctional Institution, P. O. Box 158, M.B. #129, Lowell, Florida 32663, on this 27TH day of May, 1999.

Respectfully submitted,



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